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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 666

STATE OF CALIFORNIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Northern District of California (R. 15-17)[1] is reported at 195 F. Supp. 793. The opinion of the Court of Appeals for the Ninth Circuit (Pet. App. 13-20) is reported at 307 F. 2d 941.

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[1] Record references are to the Transcript of Record filed in this Court by petitioner.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21) was entered on September 20, 1962. The petition for a writ of certiorari was filed on December 15, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the claim of a State to recover costs incurred in the suppression of a fire started by federal employees and, through their alleged negligence, allowed to spread beyond federal property is cognizable under the Federal Tort Claims Act.

STATUTES INVOLVED

The Judicial Code, 28 U.S.C. 1346, provides in relevant part:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.
>
> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with

> the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
>
> * * * *

Section 13009 of the California Health and Safety Code provides:

> The expenses of fighting any fires mentioned in Sections 13007 and 13008 are a charge against any person made liable by those sections for damages caused by such fires. Such charge shall constitute a debt of such person, and is collectible by the person, or by the federal, state, county, or private agency, incurring such expenses in the same manner as in the case of an obligation under a contract, express or implied.

STATEMENT

This action was instituted by petitioner, the State of California, under the Federal Tort Claims Act, 28 U.S.C. 1346(b), and arises out of a forest fire which occurred in September 1957 (R. 3, 4). This fire was set by members of the Forest Service, United

States Department of Agriculture, in furtherance of a project of reforestation (R. 4), on lands within the State of California owned by the United States. Alleging negligence by the members of the Forest Service both in setting and controlling the fire and in allowing it to spread to land "not owned by the United States," petitioner sought to recover $11,128.76, the expenses it allegedly incurred in suppressing the fire (R. 5). The claim was based on Section 13009 of the California Health and Safety Code, *supra*, p.3.

After filing its answer (R. 6-9), the United States moved to dismiss the action for lack of jurisdiction over the subject matter (R. 14-15), contending that the rights created by Sections 13007-13009, California Health and Safety Code, sounded in quasi contract and thus were not cognizable under the Tort Claims Act (R. 16). The district court dismissed the action, holding that the claim asserted was not within the Tort Claims Act because it was "unrelated to any claim of damage to property" (R. 17). On appeal, the Court of Appeals for the Ninth Circuit affirmed, agreeing that the claim was not within the Tort Claims Act because of the absence of damage to petitioner's property.[2]

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[2] As noted by petitioner (Pet. 4, n. 2), an action brought by the State of Oregon under its fire suppression cost statute was dismissed for want of jurisdiction by the District Court for the District of Oregon on the same grounds. That dismissal was affirmed by the Court of Appeals for the Ninth Circuit, 308 F. 2d 568. Oregon has obtained from this Court an extension of time within which to file its petition for a writ of certiorari.

ARGUMENT

The holding of both courts below that petitioner's claim is not within the ambit of the Federal Tort Claims Act is clearly correct. Moreover, there is no conflict with decisions of this Court or any other court—even "in principle," as petitioner claims (Pet. 11). The petition should, therefore, be denied.

1. The keystone of the Federal Tort Claims Act is 28 U.S.C. 1346(b). That section confers jurisdiction upon the district courts over claims for damages "for injury or loss of property, or personal injury or death" caused by the negligence of government employees. Petitioner's claim plainly does not come within these provisions.

While asserting negligence, petitioner did not allege (let alone seek recovery for) injury to, or loss of, any of its property. Rather, the gravamen of the complaint was that, as a result of the asserted negligence, public firemen in the employ of petitioner were called upon to extinguish a fire. What was sought to be recovered was simply the expenses which petitioner purportedly incurred by reason of the activities of these firemen. For a basis of entitlement to such recovery, the complaint points to Sections 13007-13009 of the California Health and Safety Code. In substance, these sections confer upon the state the right to demand reimbursement from a landowner of the expense of fighting a fire which, as a result of the negligence of the landowner, spreads beyond the boundaries of his land. This reimbursement is not dependent to any extent upon the fire's

endangering or damaging, property owned by the State. Negligence, coupled with the fire's extending beyond the landowner's domain, is enough.

Contrary to petitioner's apparent view, the limitations upon the waiver of immunity contained in Section 1346(b) must be given effect irrespective of the provisions of local law. It is only after it has been determined that the claim is otherwise encompassed by the waiver that there is occasion for inquiry into the liability of a private defendant in like circumstances "in accordance with the law of the place where the act or omission occurred." For example, in *Dalehite* v. *United States*, 346 U.S. 15, this Court held that the jurisdictional requirement in Section 1346(b) that the claim be founded on "a negligent or wrongful act or omission" precludes recovery on a claim based on absolute liability. This holding was applied in *United States* v. *Ure*, 225 F. 2d 709 (C.A. 9) to reverse judgments against the United States based on absolute liability under state law. See also *United States* v. *Neustadt*, 366 U.S. 696.

Just as Congress could have subjected the United States to absolute liability, so too could it have provided that the United States should be responsible for any expenses incurred by reason of negligence of government employees. But it did not do so. The plain words of Section 1346(b) provide that it is only where the governmental negligence occasions injury to person or property that the Act may be looked to as a means of redress.

These considerations may explain why, as the court below noted (Pet. App. 15), the question raised by the petition is one of first impression. So far as we are aware, this case and a similar suit brought by the State of Oregon (see note 2, *supra*, p. 4) represent not only the first attempts to invoke the Tort Claims Act to recover the cost of performing a public service such as fire fighting, but also the first claims in the 16-year history of the Act which are not founded to any extent upon property damage or personal injury. This is so notwithstanding the fact that, as petitioner stresses (Pet. 6), half of the States have statutes which, like that of California, permit recovery of the costs of suppressing fires.

2. There is still an additional reason why the district court lacked jurisdiction over petitioner's claim. Even as a matter of California law, the claim was founded in contract and not in tort. Accordingly, it could not be cognizable under the Federal Tort Claims Act in any event and, being in excess of $10,000, was also beyond the Tucker Act jurisdiction of the district court. 28 U.S.C. 1346(a) (see p. 2, *supra*).

It is clear from the language of the California Health and Safety Code, on which petitioner's claim is based, that the right created by that statute has a contractual footing. Thus, Section 13009 provides that fire-fighting expenses "shall constitute *a debt* of" the person negligently causing the fire, collectible "in the same manner as in the case of *an obligation under a contract, expressed or implied*" (emphasis supplied; see p. 3, *supra*). Petitioner itself suc-

cessfully claimed that the rights created by the California fire-suppression-cost statute sound in contract in *People* v. *Zegras*, 165 P. 2d 541 (Dist. Ct. App.), affirmed on other grounds, 29 Cal. 2d 67, 172 P. 2d 883.[3] Speaking of the obligation to pay such costs, the court said (165 P. 2d at 543):

> That statutory obligation is quasi ex contractu. * * * It is a civil liability for a debt growing out of the breach of an implied contract to exercise due care to regulate and control fires negligently started or permitted by individuals to spread to other lands.

Accordingly, no action on the basis of this statute could be brought under the Federal Tort Claims Act.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

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JANUARY 1963.

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[3] The statute involved in the *Zegras* case was the predecessor of the present statute but is for all relevant purposes the same. It is set forth at Pet. App. 24-25.

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